INSULATED CONTAINERS EQUIPMENT SDN. BHD.

v.

WASON ENTERPRISE SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CIVIL APPEAL NO. 16 OF 1980]
14 OCTOBER 1981

CIVIL PROCEDURE: *Judgment in default of defence - Application to set aside default judgment - Summons served on defendant without new return date - Application disallowed - Appeal - Preliminary objection - Memorandum of appeal filed before receipt of appeal record Form 40 - Effect - Service of memorandum of appeal out of time - Whether bad in law - Subordinate Courts Rules 1950, VIII r.6 , O . XV r. 3(1), 7. XXXIX r. 3(2) - Rules of the High Court, O. 55 r. 2(2)*

The respondents filed an action in the Magistrate's Court, Johore Bahru against the appellants for a sum of RM8,748.40 being the balance of the purchase price for goods sold and delivered. A writ of summons was issued endorsed with the return date being 19 December 1978 and when the action was called on for mention the summons had not been served on the appellants and a new date 3 April 1979 was fixed as the return date. The summons was served on the defendants on or about 12 March 1979.

On 3 April 1979 when the action was called on, the Court granted judgment in default when there was no statement of defence filed. The appellants alleged that the new return date was not endorsed on the summons which was served on them. The appellants applied for the default judgment to be set aside but it was dismissed. The appellants appealed against the decision of the said application.

At the appeal on 14 October 1981 counsel for the respondents raised a preliminary objection that the appellants had filed the memorandum of appeal in the High Court, Johore Bahru before the appeal record was in fact collected by the learned counsel for the appellants thereby contravening O. 55 r. 2 of the Rules of the High Court 1980 and hence the appeal was not properly brought before the Court. Also, the memorandum of appeal was served on the respondent's counsel after the 14 days period after Form 40 was served on the appellants' counsel.

Held:

[1] The appellants had not complied with the provisions of O. 55 r. 2 of the RHC 1980. Hence there was no memorandum of appeal before the court to be considered. Even though the record of appeal was before the court, such record was incomplete since no memorandum of appeal had been filed pursuant to the rules of procedure applicable and the memorandum of appeal not having been duly served on the respondents within the prescribed period.

[2] As the memorandum of appeal was filed prematurely it would render such filing bad in law since it was not pursuant to any rules of procedure.

[Appeal dismissed with costs.]

Case referred to:

Haji Mohamed bin Suboh v. Devadas [1981] 1 MLJ 136

Legislation referred to:
Rules of the High Court 1980, O. 55 r. 2, (1), (2)
Subordinate Court Rules 1950, XXXIX r. 3(2)

For the appellants - W. Chew
For the respondents - David Ng

JUDGMENT

Mohd. Yusof Abdul Rashid J:

The respondents instituted an action in the Magistrate's Court, Johore Bahru against the appellants claiming for a sum of RM8,748.40 being the balance of the purchase price due to them for goods sold and delivered by the respondents to the appellants. A writ of summons was issued endorsed with the return date being 19 December 1978. On the said return date when the action was called on for mention, the summons had not been served on the appellants and a new date, namely, 3 April 1979, was fixed as the return date. The appellants alleged that the new return date was not endorsed on the summons which was served on them on or about 12 March 1979.

On 3 April 1979, when the action was called on, the Court granted judgment in default for the respondents when the appellants had failed to file any statement of defence. The relevant provisions of the Subordinate Courts Rules 1950 applicable under the circumstances were:

> Order VIII, r. 6 -
>
> A summons commencing an action shall be served not less than seven clear days before the return date, unless the Court shall otherwise order. Return dates may be altered by the Registrar, if necessary.
>
> Order X, r. 3(1) -
>
> If a defendant desires to defend the whole or any part of the claim he shall, not less than two days before the return date in the summons, or within such further time and on such terms as the Court may allow, file and cause to be served on each plaintiff a defence in Form 6.A setoff may be pleaded by way of defence.
>
> Order X, r. 7 -
>
> If a defence ... is not filed ... the Court may in its discretion direct that the party in default be precluded from defending the claim ...

Being dissatisfied with the judgment in default handed down by the learned Magistrate on 3 April 1979, the appellants applied for the judgment in default be set aside. The learned Magistrate who heard the said application dismissed it. Against the said order dismissing the application to set aside the default judgment, the appellants appealed to the High Court.

On the hearing date of the appeal before me on 14 October 1981, the Counsel for the respondents raised a preliminary objection claiming that the appellants had failed to comply with the provisions of O. 55 r. 2 of the Rules of The High Court 1980 and hence the appeal was not properly brought before the Court.

The appellants' application to have the judgment in default set aside was dismissed on 18 May 1980 and the notice of appeal against the said dismissal was filed on 21 May 1980. The Magistrate Court sent to the appellants Form 40 - "Notice that appeal record is ready" - on 5 November 1980. The counsel for the appellants sent to the Senior Assistant Registrar, High Court Johore Bahru five copies of memorandum of appeal on 18 July 1980. It is to be

noted that the memorandum of appeal was filed in the High Court Johore Bahru before the record of appeal was in fact collected by the learned counsel for the appellant from the Magistrate's Court. The procedure relating to appeals to the High Court against any decision of a Subordinate Court is governed under Order XXXIX of the Subordinate Courts Rules 1950 and Order 55 of the Rules of The High Court, 1980. Under Order XXXIX, rule 3(2) of the Subordinate Courts Rules 1950 it was provided:

> (2) As soon as the appeal record is ready the Court appealed from shall serve the appellant with a notice in Form 40.

and O. 55, r. 2 of the Rules of The High Court 1980 provides:

> (1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in O. XXXIX r. 3, sub-rule (2) of the Subordinate Courts Rules, 1950 or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 23 in the First Schedule thereto.
>
> (2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

In compliance with the provisions of O. XXXIX r. 3(2) of The Subordinate Courts Rules 1950, the Magistrate's Court as stated earlier had served Form 40 on the Counsel for the appellants on 5 November 1980 but the Counsel for the appellants had filed five copies of the memorandum of appeal on 18 July 1980 contrary to O. 55 r. 2(1) of the Rules of the High Court 1980 since the Counsel for the appellants had not received Form 40 yet by then. It was also contrary to the said O. 55 to file five copies of the memorandum of appeal.

The Counsel for the respondents complained that he was only served with the memorandum of appeal on 21 September 1981 contrary to O. 55 r. 2(2) of the Rules of the High Court 1980 as it was well after the fourteen days' period as specified under the said Order 55 after Form 40 was served on the Counsel for the appellants. This was again in contravention of the procedure set out in the rules of court.

In my judgment the appellants had not complied with the provisions of O. 55 r. 2 of the Rules of the High Court 1980. Hence, there was no memorandum of appeal to be considered before me. Even though the record of appeal was before me, such record was incomplete since no memorandum of appeal had been filed pursuant to the rules of procedure applicable and since the memorandum of appeal had not been duly served on the respondents within the prescribed period. The appeal was dismissed with costs.

In the Federal Court case of *Haji Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136, the judgment of Ajaib Singh, J was reported in full. His Lordship said:

> It has been stressed time and again that the rules of procedure must be strictly complied with by all litigants who seek remedy of any kind in a Court of law. Any litigant who disregards the rules of procedure does so at his peril and he cannot therefore be heard to say that he has been denied justice in a cause or matter which might otherwise have been favourable to him but for the failure on his part to follow the rules for in such a case he has none but himself to blame for the predicament in which he may find himself...

Regarding the rules of procedure relating to civil appeals from the decisions of the lower Courts, His Lordship said:

> "... These rules prescribe the time within which to file a notice of appeal and the memorandum of appeal and the service thereof and of the appeal record on the respondent to the appeal. These rules must be complied with...

The facts of that case were not dissimilar to the facts of the instant case. Mr. Justice Wan Suleiman FJ in delivering the judgment of the Federal Court cited certain part of the judgment of Mr. Justice Ajaib Singh J.

> First of all the memorandum of appeal was filed prematurely in the High Court on 10 May 1978. The memorandum was required to be filed not before but within fourteen days after service of Form 40 on 17 May 1978. In a sense therefore no memorandum of appeal was properly filed in the High Court - the one filed on 10 May 1978 served no purpose as it was not filed pursuant to any rule of procedure. Secondly the memorandum of appeal and the record of appeal which should have been served on the respondent on or before 31 May 1978 were not served until 19 June 1978 ...

It is clear from the above mentioned case that to file the memorandum of appeal prematurely would render such filing bad in law since the filing was not pursuant to any rule of procedure. There is no doubt at all that to serve the memorandum of appeal out of time is contrary to the provisions of O. 55 r. 2 of the Rules of the High Court 1980. The learned Counsel for the appellants intimated that he could not serve the memorandum of appeal earlier because he had sent five copies to the High Court and did not receive back the three copies until he received the notice of hearing of the appeal from the High Court registry. This is not a valid ground at all. The appellants need file only two copies in the High Court registry and to serve a copy on the respondents. This clearly shows that either the Counsel for the appellants was ignorant of the procedure relating to appeals from the subordinate courts to the High Court or that he chose to ignore all rules of procedure relating thereto.

The appellants complained that the respondents had not complied with the rules of procedure by not endorsing on the writ of summons the correct return date of the said summons. And before me it was evident that the appellants were equally guilty of ignoring the rules of procedure relating to appeal from the Subordinate Court.

Also found at [1982] CLJ 317